

market intelligence

Volume 2 • Issue 4

GETTING THE
DEAL THROUGH 

Telecoms & Media

Global interview panel covering key economies led by Laurent Garzaniti

EU's Digital
Single Market
edges closer

Regulatory developments • Major cases • Business models • 2015 trends
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Cover: Songglod/iStock/Thinkstock

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK

Law
Business
Research

Tel: +44 20 3780 4104
Fax: +44 20 7229 6910
©2015 Law Business Research Ltd
ISSN: 2056-9025



Strategic Research Sponsor of the
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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Welcome to *GTDT: Market Intelligence*.

This issue focuses on global telecoms markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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Getting the Deal Through
London
August 2015

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Debra McGuire Mercer

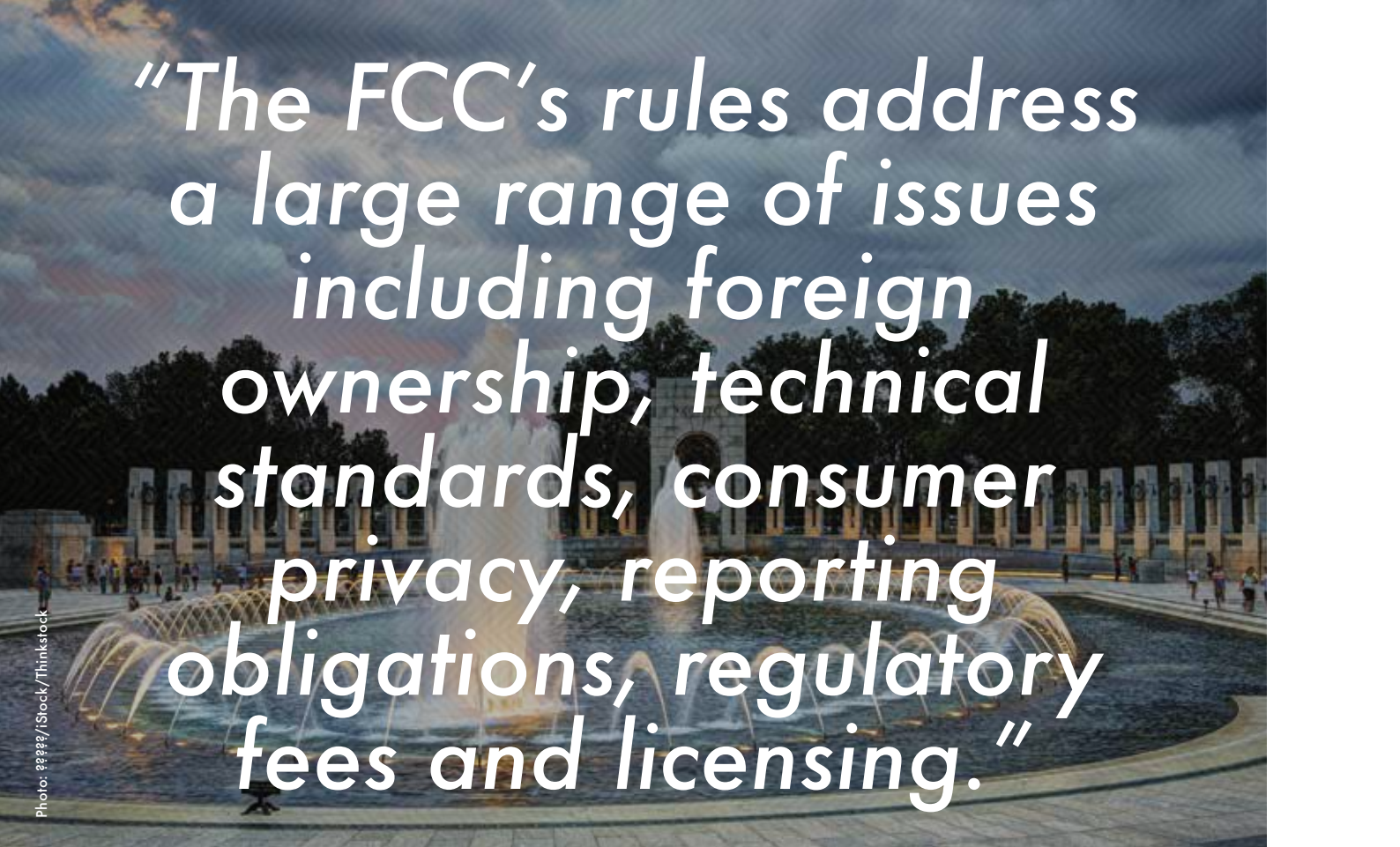


Audrey Todd Borisov

TELECOMS & MEDIA IN THE UNITED STATES

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“The FCC’s rules address a large range of issues including foreign ownership, technical standards, consumer privacy, reporting obligations, regulatory fees and licensing.”

GTDT: What were the key developments in communications and media regulation in your jurisdiction last year?

Debra McGuire Mercer & Audrey Todd

Borisov: The Federal Communications Commission (FCC) is the government agency responsible for communications and media regulation pursuant to the Communications Act of 1934, as amended (Communications Act). The most significant legal development this year was the FCC’s adoption of the Open Internet Order on 26 February 2015, in which the FCC reclassified fixed and mobile broadband internet access as telecommunications services under Title II of the Communications Act, which is applicable to common carriers. However, the FCC determined that it would take a ‘light touch’ in applying Title II and would forbear from enforcing many of the traditional Title II regulations. In the order, the FCC specifically banned the following practices deemed to be harmful to a transparent and open internet: (i) blocking of legal content; (ii) impairment (throttling) of internet traffic based on content; and (iii) favouring certain internet traffic in exchange for consideration (paid prioritisation). The newly adopted rules went into effect on 12 June 2015, although not without legal challenge.

Another important development was the FCC’s adoption of an order on 18 June 2015, that clarified several aspects of the Telephone Consumer Protection Act and the FCC’s implementing regulations which provide that

an entity may not use autodialed, prerecorded or artificial voice calls (commonly known as robocalls) to place calls to a telephone number (residential or wireless) unless the caller has received prior express consent for such calls. In particular, the FCC clarified that consumers can revoke their consent to receive robocalls using any reasonable method, texts to wireless telephone numbers are considered to be calls, and calls to wireless telephone numbers related to financial alerts and healthcare messages are allowed under very limited and specific conditions. The FCC’s order has been appealed to several federal courts.

GTDT: Does sector-specific regulation – as opposed to the general competition regime – play a significant role in your jurisdiction? Is this expected to change?

DMM & ATB: Pursuant to the Communications Act, the FCC has issued rules and orders governing various aspects of communications and media services, including wireline and wireless telecommunications, radio and television broadcasting, satellite communications, submarine cables, cable television services and radio frequency devices. As noted above, in the Open Internet Order, the FCC also has issued regulations governing broadband internet access. The FCC’s rules address a large range of issues including foreign ownership, technical standards, consumer privacy, reporting obligations, regulatory fees and licensing.

In December 2014, the FCC initiated a rulemaking proceeding to address the transition from networks based on circuit-switched voice services using copper wire to internet protocol-based (IP) networks using copper, coaxial cable, wireless and fibre (next generation networks). The FCC seeks to ensure that as the physical infrastructure of communications networks is updated, fundamental principles in the Communications Act, including competition, consumer protection, universal service, public safety and national security, are maintained. Thus, next generation networks used for telecommunications services will likely be regulated in a similar manner. However, as demonstrated in the 2015 Open Internet Order, the FCC has determined that it is not necessary to impose a strict Title II regulatory regime on broadband internet access services.

While the FCC focuses on interstate and international services, state utility commissions play a role in regulating intrastate telecommunications and cable services. State laws and state utility commission rules set forth the requirements a telecommunications carrier must meet to provide service within the state, including tariffing, establishing customer service standards, and collecting various regulatory fees to support emergency (911) service and other public interest programmes. State and local authorities also govern cable television service by entering into franchise agreements with cable operators to serve their residents.

GTDT: What is the attitude to net neutrality in your jurisdiction?

DMM & ATB: Net neutrality continues to be a hotly debated issue in the US despite the issuance of the FCC's 2015 Open Internet Order. The order follows the District of Columbia Circuit Court's 2014 decision in *Verizon v FCC* vacating the FCC's previous attempt to establish net neutrality rules, and represents a wholesale reclassification of broadband internet access services as telecommunication services subject to Title II common carrier regulation. Previously, going back more than 10 years to the *Brand X* case, broadband internet access services were classified as 'information services' subject to minimal Title I regulations (whether offered by cable, telecommunications, internet service or wireless providers). The order excludes from its scope virtual private networks, content delivery networks, internet backbone services and data caching, hosting and storage services.

A series of petitions for review have already been filed challenging the order based on procedural inadequacy, the FCC's

scope of authority, violation of Constitutional protections and lack of substantive veracity. The order's detractors argue that instead of providing certainty for providers and potential market entrants, the order imposes excessively burdensome compliance and other requirements of questionable enforceability that will invariably limit investment in new infrastructure and technologies.

The order seeks to provide protection for consumers and other users and providers of broadband internet access services through three 'bright-line rules': no blocking content, no throttling content and no paid-prioritisation of content. The order also reinforces and enhances the 'transparency rule' which requires providers to be clear in their disclosure of applicable rates, plan terms (eg, data caps) and network metrics. Other applicable Title II provisions include a prohibition on discriminatory practices, application of data privacy protections (to be clarified in a later rulemaking), enforcement, limited interconnection oversight and certain universal service requirements (whether universal service fees will be assessed has been referred to the Federal-State Joint Board on Universal Service).

While so far courts have denied requests to stay the implementation of the rules, it still remains to be seen whether the order will be able to withstand judicial review, and therein lies a certain degree of uncertainty.

GTDT: What is the regulator's approach to over-the-top services?

DMM & ATB: Over the past several years, video programming distribution services have expanded from traditional broadcast television services and cable and satellite television services to include video services provided over the internet, also known as over-the-top or online video programming distribution (OVD) services. Such services include video programming that is only available via the internet, as well as online versions of programming that is shown on broadcast or cable television. In addition, there have been OVD services that solely distribute

"The FCC is working to make additional spectrum available to meet the growing demand for wireless broadband services."

television broadcast signals. In June 2014, the US Supreme Court agreed with broadcasters that such services violate certain copyright holders' exclusive rights to perform the works contained in the broadcast signals. However, whether OVD services can rely on a statutory copyright licence that is only available to cable systems to distribute broadcast signals, remains undecided.

The FCC is in the process of determining how it will regulate OVD services. Pursuant to the Communications Act, the FCC has jurisdiction over multichannel video programming distributors (MVPDs). The statutory definition of MVPD specifically encompasses cable operators and direct broadcast satellite services, as well as service providers that offer multiple channels of video programming. MVPDs enjoy privileges that facilitate access to programming and are subject to several obligations, including the provision of closed captioning and restrictions on loudness of commercials. In 2010, Sky Angel US, LLC, an over-the-top video programming distributor sought relief under the FCC's program access rules. That complaint remains pending because the FCC has not determined whether such a service provider is an MVPD.

In December 2014, the FCC initiated a rulemaking proceeding in which it proposed to interpret the term MVPD to mean distributors that make available for purchase multiple linear (pre-scheduled) streams of video programming, including OVD service providers. Interested parties have filed comments on the FCC's proposed rules and it is expected that the FCC will adopt rules within the next few months. The FCC's decision should finally resolve Sky Angel's 2010 FCC complaint and provide guidance as to whether other OVD service providers have the same access to programming as MVPDs and whether those that seek to retransmit broadcast signals may rely on a statutory copyright licence available only to cable systems.

GTDT: *Has there been any recent granting of spectrum? Are any significant grants planned in the near future?*

DMM & ATB: The FCC is working to make additional spectrum available to meet the growing demand for wireless broadband services. The FCC assigns licences to use newly available spectrum through an auction process. In January 2015, the FCC completed an auction of Advanced Wireless Service (AWS) licences, raising a record amount of over US\$41 billion. AWS licences can be used to provide fixed and mobile wireless services that offer applications requiring substantial bandwidth, such as internet browsing, message services and video services. Dish Network Corp,

a satellite service provider that offers audio, internet and television services, won over 40 per cent of the licences. Other successful bidders included wireless carriers AT&T (which won one of the licences covering the New York City area), T-Mobile and Verizon.

The next significant spectrum auction, known as the Broadcast Television Spectrum Incentive Auction, is scheduled to commence in early 2016. In this auction, broadcast television licensees may voluntarily choose to go off the air, move to another channel, or share a channel with another broadcaster. Spectrum that is relinquished by broadcast television licensees will then be auctioned to wireless service providers, with those television licensees who gave up their spectrum usage rights receiving a portion of the proceeds. The purpose of this auction is to transfer underutilised broadcast television spectrum (the majority of television viewers do not rely on over-the-air television signals) to wireless service providers. The FCC is currently in the process of drafting rules that will govern the auction.

GTDT: *How has the debate about 'big data' played out in your jurisdiction? What has the debate focused on?*

DMM & ATB: In the US there is no single authority responsible for monitoring and enforcing the variety of federal- and state-based sector specific data protection laws (eg, healthcare, financial services, telecommunications services and collection of information on minors). Nevertheless, as 'big data' has become 'big business' and in the wake of ever-increasing small- and large-scale data breaches and examples of the misuse of collected data, a consensus is developing that there is a need for federal legislation.

The last several years have seen initiatives by the Federal Trade Commission (FTC), Congress, FCC and the White House to both investigate and propose new regulations to address the security and privacy of personal information. The FTC's initiatives included an in-depth study of the practices used by data brokers in the collection and use of consumer information, the hosting of a workshop to examine privacy issues arising out of the increasing tracking of consumers by marketers across multiple devices and the bringing of charges against an application developer that installed malware on consumer devices to harvest virtual currencies.

Earlier this year, and following on the White House's previous years' initiatives including a Consumer Privacy Bill of Rights and the release of the 'Big Data Privacy Report', President Barack Obama proposed a series of initiatives aimed at

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

The most important skill needed by an adviser in this area is the ability to understand how applicable laws will impact a client's business. Having a thorough understanding of how a client's business operates and its strategic plan enables an adviser to offer viable and practical solutions to legal issues. In addition, given the FCC's significant role in regulating telecommunications and media companies, it is helpful to develop relationships with FCC staff who can often provide informal guidance and clarification about how FCC rules may impact a particular line of business.

What are the key things for the parties and their advisers to get right when dealing with a case in this area?

Parties and their advisers must know the applicable laws, understand how federal and state laws interact, and be aware of potential changes to the law being considered by Congress, the FCC and other relevant authorities. It is also essential for companies to be aware of developments in technology and trends in how both technology companies and

their customers choose to use that technology. By keeping current on both legal and technological developments, advisers can alert companies to risks attached to certain business decisions and companies can determine how they can best use their assets to build and maintain successful businesses.

What were the most interesting or challenging cases you have dealt with in the past year?

We represent a wireless carrier that provides nationwide service, so ensuring compliance with applicable federal and state laws governing the provision of service, customer privacy, taxes and fees, and record-keeping can be challenging. We also represent a company that provides storage solutions on an international basis. Our representation requires us to understand both US and foreign law when negotiating agreements and advising the client regarding legal compliance.

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creating a uniform standard for the handling of data breaches in the US. The initiatives included the Personal Data Notification & Protection Act, a digital privacy act for students and the Consumer Privacy Bill of Rights. Bills have subsequently been introduced in the Senate addressing data privacy and the regulation of data brokers.

More recently, the FCC addressed the obligation of broadband Internet access service providers to protect consumer information in its 2015 Open Internet Order, which it followed up with an enforcement advisory notifying such providers that they are required to 'take reasonable, good faith steps to protect consumer privacy'. In April 2015, the FCC, in its largest data security enforcement action to date, entered into a settlement of US\$25 million with one of the largest carriers in the US over its failure to prevent employees in certain foreign call centres from accessing and trafficking customer proprietary network information for use by third parties in conjunction with stolen mobile phones.

GTD: What about media plurality? How have policymakers and regulators addressed this issue?

DMM & ATB: The FCC's rules include the following limitations on media plurality:

- common ownership of a full power broadcast station (television or radio) and a daily newspaper are prohibited if the station's coverage area includes the newspaper's city of publication;
- a group of television stations under common ownership may not reach more than 39 per cent of US television households;
- there may not be a merger between two of the four major television networks – ABC, CBS, Fox and NBC;
- one entity may own up to two television stations in the same market only if the stations' coverage areas do not overlap, one of the stations is not in the top four stations for the market, and eight independently owned stations would remain in the market;
- common ownership of radio and television stations is subject to limitations based on

the size of the market as measured by the number of media outlets (television stations, radio stations, major newspapers, and cable systems) serving the market; and

- the number of radio stations one entity may own in a market is subject to limitations based on the total number of radio stations in that market.

In April 2014, the FCC adopted a new rule regarding television station ownership providing that when a joint sales agreement allows one station to sell 15 per cent or more of the advertising time on the other station then the owner of the advertising selling station is also deemed to own the other station for purpose of ownership totals in the market. Congress extended the effective date of this rule to 19 December 2016.

As required by the Communications Act, the FCC undertakes a review of its media ownership rules on a quadrennial basis. The next review will commence in 2018.

GTDT: Is the global trend for consolidation in the sector also visible in your jurisdiction? If so, what were the most prominent deals in the past year or so?

DMM & ATB: On 24 July 2015, the FCC approved AT&T, Inc's (AT&T) acquisition of DirecTV, a provider of direct broadcast satellite services. By acquiring DirecTV, AT&T, a provider of wireless and wireline telephone, internet and television services, will strengthen its internet television service and expand video content streamed to wireless devices. The FCC's approval follows the decision by the Department of Justice (which divides responsibility for merger reviews with the FTC) to close its investigation after determining that combining AT&T's terrestrial internet and video business with DirecTV's satellite video business would not harm competition. The FCC's approval of the merger is conditioned on compliance with several conditions during the next four years, including: (i) the expansion of broadband internet access service to 12.5 million customer locations; (ii) a prohibition on using discriminatory usage-based allowances or other practices to favour its own video services over other online video distribution services; and (iii) the offering of discounted stand-alone broadband services to low-income consumers.

The next merger up for review by the FCC is the merger of three MVPDs – Time Warner Cable, Charter Communications and Bright House Networks – to form the third largest MVPD in the US serving over 17 million customers, and the second largest internet service provider serving

over 19 million broadband internet customers. The companies filed their application for approval of the merger on 25 June 2015 and a final decision is expected to take at least six months (approval of the AT&T/DirecTV merger took just under one year). This proposed merger follows a failed merger attempt by Comcast and Time Warner Cable, which faced regulatory hurdles owing, in part, to the fact that the combined company would have controlled over 50 per cent of the broadband internet service market and would have had the ability to interfere with competition in the online video streaming market.

GTDT: Have there been any major antitrust cases in the communications and media sectors in your jurisdiction recently?

DMM & ATB: There have not been any recent major antitrust cases initiated by the Department of Justice or FTC against US communications or media companies.

GTDT: What is your outlook for regulation in the communications and media sectors in the next two to three years? Are any major changes expected in your jurisdiction? If so, what do you predict will be the impact on business?

DMM & ATB: Over the next few years, substantial changes in the regulation of communications and media sectors are anticipated. Most significantly, the lawfulness of the FCC's Open Internet Order will be determined by a federal court. Whether the FCC's new net neutrality rules will be upheld, vacated or sent back to the FCC for further revision will directly impact how internet service providers, as well as all entities that rely on the internet, structure their relationships with each other, develop services and applications, and compete for customers. As the prevalence of over-the-top communications and video services continues to grow, consumers are increasingly relying on broadband internet access service (over traditional landline telephone and cable television services) to meet their communications and connectivity needs. In July 2015, one of the largest US cable and broadband internet access service companies reported that for the first time it has more internet customers than cable television customers. Thus, to remain competitive, telecommunications and cable service providers that provide internet access need to develop applications and services that compete with online services and to structure financially advantageous relationships with the over-the-top entities that rely on their networks to reach consumers.

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